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MUTUAL VITUPERATION IN LIBEL

The plaintiff published in a newspaper a letter which libeled the defendant. A week later the defendant published in the same newspaper a letter which libeled plaintiff. The plaintiff sued and the

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64 Fed. 280 (D. Mass. 1894). The court in Atkinson v. Doherty, 121 Mich. 372, 80 N. W. 285 (1899) denied the existence of the right of privacy, but in commenting upon the *Corliss* case said, "We are loathe to believe that the man who makes himself useful to mankind surrenders any right of privacy thereby."

[12] Sides v. F-R. Pub. Corporation, 113 F. (2d) 806, 809 (C.C.A. 2d, 1940).

[13] 6 THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE (1905) 776. An exception to this rule seems to be found, however, in the case of acts done by physicians and surgeons in practice. *Supra* vol. 5 at p. 1083.

[14] The court in the principal case did not mention the case of Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N. D. Cal. 1939) in which recovery for invasion of plaintiff's right of privacy was allowed against defendant, who broadcast a reproduction of a holdup in which plaintiff had been the victim. In that case less than two years had elapsed between time of hold-up and tortious publication, but yet invasion was not privileged—a fact which would seem to indicate that the court felt there was no public interest remaining.

[15] No Indiana cases have been found discussing right of privacy by that name, but the Indiana Supreme Court has held that in an action for slander the defendant is not entitled, under a plea of justification, to an order requiring plaintiff to submit to a medical examination. Kern v. Bridwell, 119 Ind. 226, 21 N. E. 664 (1889). *But cf.* South Bend v. Turner, 156 Ind. 418, 60 N. E. 271 (1901) (Upheld order for examination in personal injury suit). The former decision, since it resulted in the preservation of the plaintiff's dignity, may tend to show the position Indiana courts will take when the question of right of privacy comes clearly before them.

defendant claimed his letter was in answer to the plaintiff's. Held, for defendant. In case of mutual vituperation neither party can recover damages. *Kenner v. Milner*, 196 So. 535 (La. 1940).

The prevailing view in United States and England grants defamed persons a qualified privilege to answer defamatory charges. RESTATEMENT, TORTS (1938) § 594, comment i; HARPER, TORTS (1933) §249; cf. *Toogood v. Spyring*, 1 C.M. & R. 181, 193, 149 Eng. Rep. R. 1044, 1049 (Ex. 1834). Where the answer is published fairly as an answer, without malice, and for the purpose of repelling the charge, it is privileged although it is false. *Duncan v. Record Publishing Co.*, 131 S.C. 483, 127 S.E. 606 (1925); *Chaffin v. Lynch*, 83 Va. 106, 1 S.E. 803 (1887), 84 Va. 884, 6 S.E. 474 (1888); *Laughton v.. Bishop of Sodor and Man*, 9 Moore P.C.C. (N.S.) 318, 17 Eng. Rep. R. 534 (P.C. 1872). If the answer is unconnected with the plaintiff's charge the defendant has exceeded his privilege. *Brewer v. Chase*, 121 Mich. 526, 80 N.W. 575, 46 L.R.A. 397 (1899). This problem seems analagous to the assault and battery situation where the defendant can resist plaintiff's attack with only so much force as is necessary for his defense. Several jurisdictions, including federal courts, have allowed evidence of plaintiff's previous libel only to mitigate plaintiff's damages. *Shattuc v. McArthur*, 29 Fed. 136 (C.C.E.D. Mo. 1886); *Stewart v. Minnesota Tribune Co.*, 41 Minn. 71, 42 N.W. 787 (1889); *Xavier v. Oliver*, 80 App. Div. 292, 80 N.Y.S. 225 (1903). This is limited further by refusing even mitigation where a considerable period of time has elapsed. *Battel v. Wallace*, 30 Fed. 229 (C.C.S.D.N.Y. 1887); *Keller v. American Bottlers' Publishing Co., et al.*, 140 App. Div. 311, 125 N.Y.S. 212 (1910). The unique Louisiana rule that neither party can recover in case of mutual vituperation had its beginning in a slander case. *Fulda v. Caldwell*, 9 La. Ann. 358 (1854). There the court asserted, as the basis for its decision, "It is not fit that such cases as this record presents should be brought before the courts." Later, in *Bigney v. Van Benthuysen et al.*, 36 La. Ann. 38 (1884), the rule was extended to libel actions. In that case the court relied upon a quotation from ODGERS, LIBEL AND SLANDER (1st ed. 1881) 228, (6th ed. 1929) 240, that "a man, who himself commences a newspaper war, can not subsequently complain because he has the worst of the fray." The court apparently ignored a subsequent qualifying sentence that, "The privilege extends only to such retorts as are fairly an answer to the plaintiff's attacks." The principal case, however, reaffairms earlier Louisiana decisions, but is opposed to the established rule in other jurisdictions. See RESTATEMENT, TORTS (1938) § 594, comment *i*.

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